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In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 274.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE SANDS MANUFACTURING COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

HARRISON B. McGRAW,
Guardian Bldg., Cleveland, Ohio,

WELLES K. STANLEY,
Union Commerce Bldg., Cleveland, Ohio,

HARRY E. SMOYER,
Union Commerce Bldg., Cleveland, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

A comparison of petitioner's statement (pp. 5 to 11, inc. of its petition) with the Board's findings of fact (R. 28-40, inc.) suggests at once the possibility of material omissions. A comparison of said statement with the determinative facts extracted from the Board's own findings as they are stated by the Circuit Court of Appeals in its opinion (96 F. (2d) 721, R. 607-615, inc.) demonstrates the fact that there have been omitted from the petition many undisputed facts material to this Court in its consideration of the petition. It is, therefore, necessary that the most important of these material omissions be supplied here.

(a) Omitted Facts Which Transpired Between April, 1934 And June 15, 1935.

Petitioner states that in 1934 a majority of respo ent's employees became members of the M.E.S.A. (pp 6 of its petition). It next states that after two strikes spondent and the M.E.S.A. entered into a contract da June 15, 1935 (p. 6 of its petition). The false inference t arises from the sequence of these two statements, viz: t respondent did not recognize or bargain with M.E.S.A. u after two strikes, is accomplished by the petitioner's f ure to state the following facts which transpired betw April, 1934 and June 15, 1935, to-wit:

The organization of respondent's employees without any opposition on the part of respondent wh soever (R. 127). In fact, respondent stopped its tory so as to permit them to organize during work hours (R. 408). Their request that respondent c with their committee and with the representatives the M.E.S.A. was promptly granted by respondent 128). After negotiations, and without a strike, a w ten contract in reference to wages, hours and work conditions, and providing for an increase in wages, consummated on May 2, 1934. The agreement was run for sixty (60) days (R. 29, 598, 608).

In the fall of 1934 the M.E.S.A. agreed that spondent could hire additional workmen to fill a p jected Government order, on condition that it discha such additional men when the order had been co pleted. About 35 new men were hired. All but th of the additional men became members of the M.E.S without opposition by respondent. After the comp tion of the order the new men were discharged (R. 608).

Throughout the entire year from May, 1934 May, 1935 respondent negotiated with M.E.S.A. T

M.E.S.A. never had any trouble getting meetings with the respondent (R. 129, 613).

By mutual consent respondent and the M.E.S.A. employees continued to operate under the agreement of May 2, 1934 until May 21, 1935, upon which date a strike was called (R. 29, 608).

The May, 1935 strike was called during negotiations for a new agreement. It was precipitated by a demand for wage increases which the respondent refused to grant. Negotiations continued during the strike. About June 1, 1935 an oral agreement was entered into under which the strikers returned to work June 3, 1935 pending the drafting of a written contract. On June 6th the employees struck again because respondent had refused to reinstate seven of the strikers because of their inefficiency (R. 29, 30, 608). Potter, official representative of the M.E.S.A., said that several of them might be incompetent (R. 138, 608).

Further negotiations continued during this second strike which culminated in a written agreement on June 15, 1935, containing *inter alia* the provisions quoted on page 6 of the petition (R. 30, 600, 608). The agreement called for an increase in wages, for the discharge of certain employees objected to by the shop committee, and otherwise regulated the conditions of employment. On June 17, 1935 the employees, including the seven whom respondent wanted to discharge, then returned to work (R. 30, 600, 609).

The contract was drafted by the shop committee, certain changes being made at the insistence of respondent (R. 34, 608).

(b) Omitted Facts Concerning The Negotiations W Culminated In The June 15, 1935 Contract, And Interpretation By The Parties Thereto.

What the changes insisted upon by respondent w what the situation they were intended to correct was, they were incorporated into the contract, and what the committee's understanding and interpretation of t were, are matters of great importance because the f concerning these questions were among the founda stones supporting respondent's defense. On each of t matters also, petitioner's statement is silent. The omi facts are:

> During the depression preceding 1935, in o to afford to its employees as much steady employ as possible, a practice had grown up in respond plant whereby, when work was slack in a particula partment, respondent would transfer the emplo who would otherwise be laid off to busier departm continuing during the period of the transfer to them their regular wage rates irrespective of the w done (R. 31, 611). Respondent considered this p tice inefficient. It therefore insisted in the neg tions which culminated in the June 15, 1935 cont that the seniority system be changed from plant w to departmental. To accomplish this change the ph "and by departments" was added to Article 5 of agreement of June 15, 1935, which was originally mitted to respondent in the following form: "T when employees are laid off, seniority rights s rule" (R. 34, 611, 612). The word "only" was inserted in Article 6 at the instance of respond (Compare R. 603, an early draft of said contract, w R. 600, the final draft, R. 612). The express purp of these changes was the abolition of the above p tice. The shop committee understood that the cha

were for the purpose of enabling the respondent to "run by departments" (R. 574, 576, 579, 289, 365, 612). Shortly after the execution of the contract respondent posted in its plant a classification of its employees by departments, and thus gave notice of its intention and desire to proceed under the contract (R. 170, 175, 206, 434, 518, 574, 612).

(c) Omitted Facts Concerning The Negotiations Between June 17, 1935 And August 1, 1935.

On page 6 of the petition the petitioner's statement jumps from June 15, 1935 to the beginning of August, 1935 thereby creating the false inference that the controversy between respondent and its employees arose on the latter date. Also, that negotiations between respondent and the shop committee did not begin until that date. Nothing could be farther from the facts. The omitted facts are:

Discussions between the shop committee and the respondent concerning the application of the rule of departmental seniority began within a week after the men returned to work on June 17th (R. 294). They continued throughout July (R. 289, 290, 291, 387). Meantime the respondent again "tried out" the old practice and again condemned it (R. 290, 291). Article 20 of the agreement of June 15th was a constant threat to strike. It provided as follows:

> "In case of a misunderstanding between the management and the employees, the committee shall allow the management forty-eight (48) hours to settle the dispute, and if then unsuccessful the committee shall act as they see fit." (R. 602)

It is plain that respondent again "tried out" the old practice because of the insistence of the men and because of the constant fear of strikes (R. 612).

By the middle of July practically all of respondent's accumulated orders had been filled and respondent proceeded to reduce its working force. About July 15, 1935, after conferences between the management and the employees, all the men in the tank heater department, with the exception of the foreman, an "old" M.E.S.A. emp , were laid off (R. 30, 609).

(The f. ote at the bottom of page 6 of the petition correctly defines "new" and "old" men as those terms have been used throughout this case.)

About July 30, 1935 a notice was posted on the time clock in the plant of respondent that the new men would be laid off on July 30, 1935 and the old men would be laid off on August 2, 1935. After the lay off of the new men another notice was posted to the effect that the plant would be operated with the old men on a schedule of three days a week (R. 30, 609).

We digress momentarily to mention that at about the time of the settlement of the strike, June 17th and thereafter, a number of the "new" men became members of the International Association of Machinists affiliated with the American Federation of Labor (R. 38, 609).

We now return from the digression and quote from the findings of the Board the immediate dispute which brought the controversy to a head:

> "Thus, by the end of July and the beginning of August, some departments were being operated on a part time basis and others had been practically shut down. At or about this time, the respondent wished to increase the working force in the machine shop, the *key* department, while at the same time shutting down the other departments. *Repeated conferences were held between the management and the shop committee in reference to this matter. The posi-*

tions of the respondent and the employees were diametrically opposed. The management contended that new men, experienced in machine shop work, be employed in preference to the old men. The shop committee contended that there was sufficient stock in the machine shop, and that in any event, under the agreement of June 15, 1935, the respondent could not hire any new men for the machine shop as long as old men were still laid off. The management claimed that the shop committee was insisting upon a violation of Article 5 of the agreement.'' (R. 31, emphasis ours) (R. 609)

(It should be remembered that the "new" men respondent wished to hire for its machine shop were former employees, temporarily laid off, who were entitled under the National Labor Relations Act to nondiscriminatory representation by the M.E.S.A. as the exclusive collective bargaining agent in respondent's plant.)

(d) Omitted Facts Concerning The August, 1935 Negotiations.

Additional conferences were held at frequent intervals until August 19th when the shop committee was asked by the management to consult with the men and report whether they desired that the working force in the machine shop should be increased with "new" men while other departments were temporarily shut down, or that the whole plant should be temporarily shut down. Two days later the committee stated that it preferred that the plant be shut down. Respondent closed its factory on August 21st (R. 31, 32, 609) (Petition, p. 7).

(e) Omitted Facts Showing The Committee's Ultimatum And The Impasse.

The nature of the committee's reply on August 21st to respondent's request on August 19th that the committee go back to the men to see if they could find "a solution to the problem" (R. 519, 570, 572), demonstrates the completeness of the impasse. Pansky, a committeeman, testified:

> "He could shut down for a couple of weeks if he preferred it, but he couldn't lay off the old men first." (R. 377)

Jindra, another committeeman, testified:

> "We could see no way out, so we told the management to shut down the plant." (R. 572)

It was an ultimatum from the employees to the respondent meaning that the respondent either waive departmental seniority or shut down its plant. It was reinforced by Article 20 of the agreement (R. 602) which meant that respondent must either agree with the committee within forty-eight (48) hours or they would call a strike (R. 612).

(f) Respondent Abrogated Its Agreement And Filled The Places Of The M.E.S.A. Employees Because Of Their Breaches Of Contract.

Respondent then abrogated its agreement with the employees. On August 26th or 28th it negotiated an agreement with the International Association of Machinists and sought experienced machinists through said union and the Cuyahoga County relief organizations. On September 3rd the respondent opened its machine shop, invited a number of its former machine shop employees, all members of the International Association of Machinists, to return to work, but filled other places in the machine shop with new men instead of calling old men from other

departments of the plant. Respondent offered individual contracts to four of the old M.E.S.A. men whom it wished to employ as foremen. The Board found that to two of them the offer was made on condition that they join the International Association of Machinists (R. 32, 609).

(g) The Board Found The Impasse Complete.

The Board in its findings alleges a duty on the part of respondent to inform the committee that, in the event they ordered a shut down on August 21st, it was respondent's intention that the M.E.S.A. employees would not be recalled and then bargain about that (R. 37). The futility of such an act and the temper of the men is best shown by the Board's own finding in that regard:

> "Nothing was said by Garry Sands or anybody else in behalf of the respondent to the committee which would have indicated that the closing of the plant meant that the old employees would not be recalled. *It is inconceivable that the committee would have accepted this, especially since the men had been so successful when they struck a few months earlier.*" (R. 37) (Emphasis ours).

In other words, the employees would have maintained their position and there would have been a strike.

(h) The Board Found Respondent Honest And Sincere In Its Opinion That The Employees Had Wilfully Broken Their Contract.

The sincerity of respondent's claim that the shop committee had taken its position in wilful violation of the contract was admitted by the Board in its decision, but is omitted in petitioner's statement. On this point the Board found:

> "Although the Board is of the view that an *honest* difference of opinion existed on the construction of

the June 15th agreement, the case against the respondent is not in any way prejudiced if the stand of the shop committee in resisting the demand of the respondent to build up the machine shop with new men instead of with old men is considered a violation of the agreement." (R. 36) (Emphasis ours).

The latter part of this statement, if it were affirmed, would make of respondent's contract with the M.E.S.A. a mere "scrap of paper," render futile and unenforceable the collective bargaining contracts which the National Labor Relations Act was designed to promote, and deprive all parties to them of any legal reason for entering into such contracts.

(i) The Board Found Respondent's Impelling Motive Was Operating Efficiency And Not Any Purpose To Violate The Act.

The motive of the respondent for insisting upon compliance with the contract is important, for by it are all of respondent's later acts to be judged. The petition would infer an ulterior motive and omits to state the Board's own finding as to the underlying motive for respondent's acts. We therefore quote said finding:

"Rates of pay in respondent's plant depended on length of service and not on the nature of the work. Thus, when old men were transferred to any department, they continued to receive higher rates than younger men in the same department. *We are inclined to believe that the impelling motive for the opposition of the respondent to transferring the old men to the machine shop instead of hiring new men lay in this fact.* In fact, Garry Sands testified that after the shut down of August 21st, he complained to Albert Farrell, one of the old men, about the unfairness of transferring men receiving high wages to do work which could be done by men receiving much less." (R. 36

Therefore, the impelling motive was operating efficiency and not to interfere with its employees in the exercise of their rights to organize and bargain collectively, and the Board so finds.

(j) Respondent Fully Performed The Contract. It Was Entitled To Performance.

Whether or not respondent performed its contract is important. Nowhere in this case has it ever been charged that respondent violated its contract. On this point the Court below said:

> "Respondent is not charged with breaking the contract, and, in fact, this record shows that it complied on its part with all terms of the agreement, but the shop committee refused to permit respondent to increase the force in the machine shop in accordance with the contract, even though the only alternative was closing the plant." (R. 612)

(k) The Board's Own Findings Are To The Effect That Respondent Was Not Attempting A General Wage Reduction.

On page 7 of the petition, the petitioner would lead this Court to believe that a general wage reduction was in respondent's mind. The absolute falsity of this assertion is demonstrated by the Board's finding as to the impelling motive for respondent's acts hereinbefore quoted (R. 36). It is further negatived by the Board's finding that the offer of re-employment at lower wages for guaranteed steady work was made to the four "old" men, and no more:

> "However, Hilliard J. Sands, who was present at these conversations, admitted in his testimony that Garry Sands told Pansky, Linsky, Dolish and Ochs, the four men who were called back, that the offer of re-employment was being made only to them and not to the rest of the old men." (R. 33)

The falsity of the assertion is further negatived by a finding refused by the Board (R. 77) but compelled by the uncontradicted evidence in the record, namely, that the respondent desired to hire these four "old" men for foremen (R. 329, 332, 343, 380). Pansky was a foreman (R. 381). Linsky was a foreman (R. 338). Dolish was a leader or keyman (R. 327). Ochs was to have been given charge of the coil room and the tank heater department (R. 391). The falsity of the assertion is completely proved by the fact that the individual negotiations with these four "old" men took place, *not before, but after* the new contract had been negotiated with the International Association of Machinists (R. 32). That said new contract provided lower wage rates than the M.E.S.A. contract is of no moment when it is remembered that in the main it covered help without previous experience in respondent's plant, to be recruited from the unemployed union members and from the relief organizations, and that there was no piece work in respondent's plant. The Board's own finding is that wages in respondent's plant depended on length of service (R. 31). It could not be expected that first time employees should receive the same rates as the old employees.

(l) Respondent Had No Opportunity To Reinstate Any M.E.S.A. Employees.

Petitioner's statement that "Others of the 'old' men who applied for their positions were told that their places were taken" requires further facts lest another false inference be raised. The Board's finding as to this matter is as follows:

> "A few of the old men asked respondent for work after the plant reopened, but were told that their places were taken." (R. 33)

It is uncontradicted that no one of the M.E.S.A. employees asked to be reemployed until about thirty (30) days after

the plant had reopened and after the picketing by the M.E.S.A. had ceased (R. 535). That their places were filled is undenied.

(m) The M.E.S.A. Would Not Permit Its Members To Apply For Reinstatement.

The reason that only a few of the M.E.S.A. employees applied for reemployment, and then only after a lapse of thirty (30) days after the plant reopened, was conclusively established to have been because the M.E.S.A. announced a policy of suspending from its membership any member who went to work for respondent after September 3, 1935. This finding was refused by the Board (R. 76). The fact was admitted by the secretary of the M.E.S.A. union to which the employees belonged (R. 230, 231). It was not denied.

(n) Potter's Telephone Call.

On page 8 of the petition it is stated that the M.E.S.A. asked Sands to meet with the committee and Sands refused. This is a clever disguise of the facts, which are as follows:

At the time of the organization of respondent's employees by the M.E.S.A. Potter was employed by respondent and became a member of the Shop Committee (R. 29). Later in 1934 he left respondent's employ and became state chairman of M.E.S.A. (R. 29). He continued to participate in negotiations with respondent for some time (R. 29). *Potter last participated in negotiations with respondent on May 30th or May 31st, 1935.* He was not present in the negotiations by which the second strike which occurred June 6, 1935, was settled (R. 145, 146). From that time on all negotiations were handled by the Shop Committee without Potter (R. 31, 158). Potter re-entered the picture for the first time on September 3, 1935, the date upon which

respondent reopened its plant. On that date he telephoned Garry Sands (R. 134).

(Note in his testimony the complete absence of any reference to the committee and that his opening remark to Mr. Sands was in substance: "What the hell are you trying to pull off there?" (R. 134) This telephone conversation resolved by the Board from conflicting evidence as to whether or not Potter asked Sands to meet him at all, is all the evidence there is in the Record tending to support the Board's finding that the respondent refused to bargain.)

(o) The Shop Committee Never Requested A Meeting After The Shutdown. Rather It Maintained Its Defiant Position By Picketing Respondent's Plant For Thirty (30) Days.

The Board refused to find, although the evidence in support of it is uncontradicted and undenied, that after August 21st, 1935 the shop committee made no request for a meeting with respondent. Nor did it after that date evidence any intention to withdraw in the slightest degree from the position it had taken prior to that date in opposition to the rule of departmental seniority set forth in the contract (R. 76).

Petitioner's statement is likewise silent on the activities of the M.E.S.A. beginning September 3, 1935. The omitted facts are:

The M.E.S.A. immediately started to picket respondent's plant and continued their picketing all during the month of September (R. 34). They continued to enforce their policy of suspending from membership all M.E.S.A. members who should apply for reinstatement (R. 76).

(p) There Were No "Changed Conditions" After August 21st, 1935.

These acts of the M.E.S.A., and each of them, demonstrate the settled determination on the part of the M.E.S.A. to adhere to the position taken by them on August 21, 1935 when they ordered respondent to shut down its plant rather than submit to the rule of departmental seniority established by their contract with respondent. In the light of these facts petitioner's remark about changed conditions after August 21st (p. 11 of the petition) is incongruous.

(q) The Trial Examiner Held That The Committee Gave Little Consideration To The Wishes Of Respondent In Connection With The Operation Of Its Plant.

Petitioner's statement is also silent as to the deportment of the committee. The Trial Examiner saw and heard the members of the Shop Committee testify. In his report he stated:

> "It is the opinion of the undersigned that much of the difficulties might have been averted had the said employees given greater consideration to the wishes of the management in its operation of its plant, particularly in its desire to increase production in the machine shop department during the middle of August, 1935." (R. 61, 62)

This opinion by the Trial Examiner was arbitrarily disregarded by the Board in its findings and a finding to this effect was arbitrarily refused by the Board (R. 91).

(r) There Was No Substantial Evidence Of Any Hostility On The Part Of Respondent To The M.E.S.A.

The Board's statement that the court below ignored the Board's findings upon evidence that in June and July respondent had evinced hostility toward the M.E.S.A. commands attention (p. 11 of petition).

In its anxiety to find evidence tending to show antagonism on the part of respondent to the M.E.S.A. union the Board pounced upon the Sands-Rudd and McKiernan-Norman conversations (R. 38).

The Sands-Rudd conversation took place within ten (10) days of June 17th (R. 218, 420). Such a conversation in June, immediately following two strikes called three days apart (R. 30) would be *too remote* to furnish a motive for respondent's acts late in August. *Contrary to the evidence the Board adjusted the date by placing the conversation "late in July"* (R. 38). McKiernan was the shipping clerk (R. 503). His conversation with Norman took place June 26th, two months before the impasse. After being passed around from foreman to foreman, there was a hearing and Norman was discharged as completely incompetent and inefficient, with the approval of the committee (R. 35). The committee never told him that they agreed to his discharge. He testified, "I think it was a grudge against me" (R. 302). McKiernan, the shipping clerk who discharged him, denied that the union was mentioned in the conversation (R. 504). Uncorroborated, the Board accepted Norman's statement rather than McKiernan's when only a curscry reading of Norman's testimony will convince the reader that his testimony on this point is incredible. Furthermore, the conversation took place June 26th.

On the other hand, the charge was filed in behalf of 47 men. *If respondent had committed any acts of hostility toward M.E.S.A. as an organization, from these 47 men the Board would have been able to unearth some real evidence on the subject, some act or acts closer than two months, that would prove that hostility.* That the Board found no such evidence and presented no such evidence certainly dispels even the slightest suspicion that may have been otherwise created.

The court below rightly held that there is no substantial evidence to support the Board's finding in that regard, a holding consonant with the Board's finding that respondent was honest in its stand on the contract and that the impelling motive was to put an end to an inefficient practice in its factory in a manner within its rights under its contract.

The court's holding that:

> "In view of the background, the uncontroverted facts as to the complete lack of any attempt to prevent organization or to discourage affiliation with the M.E.S.A., the want of espionage or coercion practiced on the part of the management and the express findings of the Board as to repeated conferences, honest difference of opinion, and diametrical opposition of views, we think that only one conclusion can be drawn, namely, that the respondent sincerely attempted over a long period to negotiate with the M.E.S.A." (R. 613).

was compelled by the record.

The Errors Assigned By Petitioner Do Not Conform To The Facts Found By The Board And The Admitted Facts In The Record.

1. Petitioner assigns as error the action of the Circuit Court of Appeals in not holding that respondent violated the National Labor Relations Act by failing to bargain collectively with the fully authorized representatives of its employees at a time "*when changed circumstances indicated a reasonable probability that a prior temporary impasse could be resolved through further negotiation.*" (p. 11 of the petition).

The error assigned is in direct conflict with the petitioner's argument to support it in that, in the error assigned, it is assumed that the alleged temporary impasse could be "resolved through further negotiation" (p. 12

of petition). Later the petitioner argues that it was to be hoped that sufficient orders would accumulate during the period of a temporary shutdown and that the issue thereby "would become moot" (p. 15 of the petition). This is equivalent to an admission on the part of the petitioner that further negotiations would accomplish nothing. The fact that the issue had arisen right after the June strike, when there was a large volume of orders, proves that it would not become moot.

The facts found by the Board as to the settled determination of the committee to insist that respondent waive the rule of departmental seniority established by the contract, and as to their directing the picketing of respondent's plant for thirty (30) days for the purpose of enforcing that position, completely refute the petitioner's assumptions as to "changed circumstances," "reasonable probability," "prior temporary impasse," and that anything could be "resolved through further negotiations."

2. The second error assigned by petitioner is the Court's failure to hold that the Board's finding that, following a temporary lay-off of its employees, respondent denied reinstatement to employees because of their affiliation with a particular labor organization, was supported by substantial evidence. This alleged error is completely refuted by the complete lack of evidential facts to support it and by the Board's express findings that respondent's position was *honestly taken* on its interpretation of the contract, that the *impelling motive* was operating efficiency to be secured by enforcing the rule of departmental seniority set forth in the contract, and that *no employees applied for reinstatement until their places had been filled.*

3. Petitioner's third assignment of error concerns respondent's offer to reemploy four "old" men. This alleged error is completely refuted by the uncontradicted facts in the Record that the respondent was not offering

reinstatement to the employees, but was attempting to rehire upon new terms of employment four "old" men for the purpose of making them foremen over its new crew of employees. The National Labor Relations Act does not prevent an employer from hiring individuals on whatever terms he may by unilateral action determine. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 45, 57 S. Ct. 615, 628, 81 L. ed. 893, 108 A. L. R. 1352.

4. Petitioner's fourth assignment of error is likewise not consonant with the facts. It assumes a "temporary lay-off." The findings show that the "old" employees would not perform their services in accordance with the provisions of their contract with respondent. Respondent therefore replaced them with new employees. The old employees were thereby lawfully dischargd. The error assigned assumes a "temporary impasse." The facts found by the Board show a settled determination on the part of the employees to maintain that position, a position which they maintained throughout thirty (30) days of picketing and continued to maintain throughout the hearings.

Each of the assignments of error fails to take note of the fact that *the difficulties between respondent and its employees were not occasioned by any impasse in negotiations looking toward a contract. Respondent's difficulties were occasioned by the wilful refusal of the employees to perform their contract. Respondent's contract gave it the right to departmental seniority in its plant without further negotiations immediately upon the execution and delivery of the contract. In negotiating for its performance by the employees for two full months and more before exercising its right to abrogate the agreement, respondent went farther than the "second mile" in an honest effort to dispose of the controversy by negotiations.*

5. Petitioner's fifth assignment of error is disposed of by the Board's findings of fact and by other admitted facts, all of which disclose no evidential basis for the Board's order, and that the order was erroneous, and should not have been issued, wherefore it should not have been enforced and was rightly set aside and held for naught.

There Is No Conflict With Jeffery-DeWitt Insulator Co. v. National Labor Relations Board.

As a reason for granting the writ, petitioner alleges a conflict with *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board,* 91 F. (2d) 134, certiorari denied, 302 U. S. 731.

There is no conflict between the cases.

In the *Jeffery-DeWitt* case the 1935 dispute *arose over the making of a contract.* It followed unsuccessful attempts on the part of the union in 1933 and 1934 to secure a written agreement.

In the Sands case the dispute *arose over the wilful refusal of the employees to perform a contract already made.*

The *Jeffery-DeWitt* case prescribes the extent to which an employer must go *in endeavoring to reach an agreement* with the representatives of his employees.

The Sands case accepts a collective bargaining agreement as a contract mutually enforcible by the parties and *prescribes a limit beyond which the employer need not go in negotiations when employees refuse to perform their contract.*

In the *Jeffery-DeWitt* case the respondent's rights were determined solely upon the rights of the employer and employees under the National Labor Relations Act.

In the Sands case the respective rights of the employer and employees were first established by a contract made pursuant to the provisions of the National Labor Re-

lations Act. The adjudication of their rights required *that respondent be accorded the full measure of its rights under that contract. It was not the purpose of the National Labor Relations Act to destroy respondent's contract.*

In the *Jeffery-DeWitt* case those with whom respondent refused to bargain were striking employees.

In the Sands case the places of the old employees *were lawfully filled by Sands with other employees because of the breach of their contract by the M.E.S.A. employees.*

In the *Jeffery-DeWitt* case *on four different dates* while the strike was on and the respondent had not more than 50% of a full complement of employees working, *the respondent refused to meet with the committee* although requested to do so by Conciliators at the instance of the committee.

In the Sands case, after a new contract had been made with another labor organization under which new employees would render their services, Sands *received one telephone call* from a union official who had not been in the previous negotiations. *There were no communications by any Conciliators and none whatever by the Shop Committee* with which the negotiations had been conducted.

In the *Jeffery-DeWitt* case the finding was that after nearly a month of idleness the striking employees *were doubtless willing to make concessions.*

In the Sands case the conclusion is compelled that the M.E.S.A. was *willing to make no concessions on September 3, 1935, that it immediately instituted the picketing of respondent's plant and continued said picketing for thirty (30) days to enforce its position. During all of this time the M.E.S.A. admitted that it promulgated a policy that it would suspend from membership any M.E.S.A. employee who applied for reinstatement.* The record shows that it maintained the same position at the hearing.

Petitioner's observation that at the time the plant w shut down it was intended that enough orders would cumulate so that the issue in controversy would beco moot (p. 15 of the petition) is manufactured and with support in the Record. The converse is true because the finding that the issue was in dispute immediately af the men returned to work in June (R. 30, 34). At this ti there were so many orders that the respondent was for to hire additional help (R. 30).

In the *Jeffery-DeWitt* case the respondent *had tak no step* that would prevent further negotiations likely culminate in an agreement.

In the Sands case the respondent *lawfully abroga its agreement and, with the A. F. of L. organization, entei into a lawful and mutually enforcible agreement inc sistent with the M.E.S.A. agreement.*

For the above reasons there is no conflict between t Sands case and the *Jeffery-DeWitt* case.

There Is No Conflict With National Labor Relations Board vs. Mackay Radio & Telegraph Co.

As a second reason for granting the writ, petitio alleges that the decision of the court below is in confl with the decision of this Court in *National Labor Relati Board v. Mackay Radio & Telegraph Co.*, 58 S. Ct. 904, 9 There is no conflict between the decisions.

In the *Mackay* case a strike was called in San Francis by the union *because of the unsatisfactory state of its ne tiations for an agreement with the employer.* The employ filled the places of the strikers with transferred employe to eleven of whom it promised that their positions wo be permanent. Within three days after the strike w called the strikers became convinced that the strike wo fail and desired to return to work. Their desire was co

municated to the employer. The employer said they might return to work but, on a list of all the strikers, the employer checked the names of eleven who he said would have to make applications for reinstatement which would be subject to the approval of an executive of the employer in New York. Shortly thereafter six of the eleven strikers in question took their places and resumed their work without challenge, it having turned out that only five of the transferred employees desired to stay in San Francisco. The remaining five of the strikers on the list, each of whom was prominent in union activities, *applied for reinstatement.* They were told their positions were filled and that their applications for reinstatement would be considered in connection with any vacancy which might occur. They then filed charges of discrimination under Section 8 (3) of the National Labor Relations Act. The Board ordered them reinstated with back pay. The decision of the Circuit Court of Appeals refusing to enforce the order was reversed by this Court on the ground that the preparation and use of the list *was with the purpose to discriminate against those most active in the union* and therefore a violation of the Act.

However, this Court held:

"There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations in New York. On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. *Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business.* Although §13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' *it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places*

left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

National Labor Relations Board v. Mackay Radio & Tel. Co., Vol. 82, L. ed., Adv. Op., Oct. Term No. 17, p. 867. (Emphasis ours.)

There is a great difference between employees who strike because of a legitimate trade dispute and employees who refuse to render their services in accordance with their contract, as in the Sands case. In the latter case the employer has the right to discharge him and there is nothing in the National Labor Relations Act that deprives the employer of this right.

As was said by this Court:

"The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, at page 45, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L. R. 1352.

In our case at the time of the refusal of the M.E.S.A. employees to perform under their contract respondent was guilty of no unfair labor practice. Acting upon their refusal it filled the places of the M.E.S.A. employees with A. F. of L. employees. Even if the M.E.S.A. employees had thereafter applied for reinstatement and respondent had refused to reinstate them because their places were filled, under the *Mackay* case there would have been no vio-

lation of the Act. *But the M.E.S.A. employees never did apply for reinstatement* and *the M.E.S.A. union refused to permit them to apply for reinstatement,* as hereinbefore shown. There was therefore no violation of Section 8 (3) of the Act.

The *Mackay* case also has a bearing on respondent's acts with reference to the four "old" M.E.S.A. men to whom the respondent offered foremen's positions. That there was no union discrimination in their selection is evidenced by the fact that some of them had been foremen and that Pansky, one of the "old" men was a member of the shop committee, and that all of them were members of the M.E.S.A. Bearing on respondent's right of selection under the circumstances, this Court said in the *Mackay* case:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike. * * *."
>
> *National Labor Relations Board vs. Mackay Radio & Tel. Co.*, Vol. 82 L. ed. Adv. Ops. Oct. Term, 1937 No. 17, p. 868.

The *Mackay* case defines the duties of the employer toward strikers who have lost a strike and *who apply for reinstatement after they have called off the strike.* It holds that it is a violation of Section 8 (3) of the National Labor Relations Act to refuse to reinstate them to available jobs upon application or to discriminate between them for union activity in making reinstatements. *Section 8 (5) of said Act, which makes it an unfair labor practice to refuse to bargain collectively was not involved in the Mackay case.*

In our case the bargaining had already occurre There was a bargain, a written contract. The complainin employees had broken that contract. Furthermore the never offered to return and perform their services in a cordance with their contract with respondent. Neither di they ever apply for reinstatement on any other term *There can not be a refusal to reemploy or to reinstate un there has been an offer or request on the part of the co plaining employees to return to work.*

The *Mackay* case approves the procedure employed b the respondent and between it and the opinion of the Cou below there is no conflict.

In Re National Labor Relations Board v. Columbian Enameling and Stamping Co., Inc.

Petitioner refers to its petition for certiorari in *N tional Labor Relations Board v. Columbian Enameling a Stamping Co., Inc.*, No. 229, October Term 1938, and r quests this Court to consider the arguments in certain po tions of that petition as applicable to its petition in o case (p. 18 of the petition).

A comparison of the facts in the *Columbian Enameli* case with the facts in our case will easily demonstrate th the facts of the two cases are not at all similar.

It appears from the opinion of the Circuit Court Appeals which decided the *Columbian Enameling* case th the *ratio decidendi* was equitable estoppel and the doctri of unclean hands, which rules of equity the court held a plicable to the acts of the complaining employees in th case.

In our case equitable estoppel and the doctrine of u clean hands play no part in the decision of the cou Rather the court grounds its decision, in part upon t lack of any substantial evidence to support the order the Board, and in part upon a rule of law always enforc

by courts of law, namely, that where an employer-employee relationship is created by contract and the employee commits a breach of a substantial provision of that contract, he may be discharged.

A further prominent point of difference between the two cases is that in the *Columbian Enameling* case the Board has contended that the respondent therein had violated its contract (p. 22 of said petition). In our case respondent fully performed its contract with the complaining employees and neither the complaining employees nor the Board have ever contended to the contrary.

The two cases are essentially different both as to facts and as to decisive rules of law applicable to each of them.

The Decision Below Is Right.

The court below held that there was no substantial evidence to support the Board's order against the respondent. Its holding is based upon findings of evidential facts by the Board which compel that holding and with which any other holding is inconsistent.

The court also held that:

> "While the statute creates new and important rights for labor, it does not abrogate the correlative rights of the employer." (R. 611.)

In enforcing the obligations of respondent's contract with the M.E.S.A. the court below applied in this, a labor case, the same rule of law that has always been applied by this Court in litigation involving the rights of parties to valid contracts.

> "The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do."
>
> *Dermott v. Jones*, 2 Wall. 1.

"The principle deducible from the authorities
that if what is agreed to be done is possible and lawf
it must be done. * * * It is the province of courts
enforce contracts—not to make or modify them. Wh
there is neither fraud, accident, nor mistake, the ex
cise of dispensing power is not a judicial function."

The Harriman, 9 Wall. 161.

"The general rule is that competent persons sh
have the utmost liberty of contracting and that th
agreements voluntarily and fairly made shall be h
valid and enforced in the courts."

Twin City Pipe Line Co. v. Harding Glass Co.,
U. S. 353, at 356.

The National Labor Relations Act was designed for
purpose of promoting collective bargaining.

Agreements voluntarily entered into between empl
ers and employees have been one of the greatest stabiliz
influences in the field of industrial relations.

Agreements between employers and employees h
been efficacious in preserving industrial peace for the r
son that they have been mutually enforcible in the cou

The argument of the petitioner in this case, if uph
would make of the respondent's contract a "scrap
paper." It would destroy the bargain which the respond
made with its employees. It would destroy the employe
respect for their own agreement. It would provide a va
reason for the refusal of all employers to enter into c
tracts with their employees. Such was not the purpose
the National Labor Relations Act. The decision of
court below is consistent with the purposes of the Natio
Labor Relations Act.

CONCLUSION.

Respondent normally employs from 35 to 50 men. The order of the Board involves an award of back pay to 47 men from September 3, 1935.

These men when employed by respondent flatly refused to perform their services for the unexpired six (6) months' period of their contract with respondent.

Upon that refusal, after repeated negotiations, over a two (2) months' period, that left the positions of the parties diametrically opposed, respondent exercised its rights under the contract and obtained a new working force in pursuance of an *honest* opinion that it had the right to do just that. The Board found that the *impelling motive* was not to accomplish any purpose violative of the National Labor Relations Act.

When an employer and his employees have entered into a contract there can not be one rule of law for the employer and another rule for the employees. The Act grants certain rights to employees. It nowhere takes from the employer his correlative rights. It nowhere takes from an employer the right to insist upon performance of a valid agreement. Neither does the Act anywhere provide that employees may violate their contracts with impunity.

The Act compels employers to enter into negotiations with their employees looking toward a contract. The National Labor Relations Board and the Courts which administer the Act should compel the parties to such contracts to keep them. Otherwise the contracts are useless and the purpose of the Act will have been wholly destroyed. The order of the Board in this case, if enforced, would have destroyed respondent's contract at the instance of the employees who had broken that contract. The court below enforced the obligations of the contract and in so doing it was right.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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